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THE SUPREME COURT AND THE ANTI-TRUST ACT.

The Act of Congress of July 2, 1890, commonly called the Sherman Anti-Trust Act, contains the following provisions:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations shall be deemed guilty of a misdemeanor. * * *"

On their face these prohibitions appear to enforce only established doctrines of the common law. Certainly they do not seem revolutionary or in conflict with sound political and economic policies. However, although twenty years have elapsed since the Anti-Trust Act was passed, great uncertainty exists as to its meaning and legal effect. In particular, the following two fundamental questions remain unsettled, namely:

(1) Does the Act render unlawful every contract or combination that diminishes competition in interstate commerce? In some of the opinions delivered by judges of the Supreme Court there are *dicta* which, read without regard to the context, seem to support the proposition that the Act should be construed as prohibiting every contract or combination that in any degree diminishes competition in interstate commerce; but there is no actual decision supporting this proposition. Such a construction of the Act would render unlawful many contracts and business arrangements that always have been deemed reasonable and proper and would render it impossible to carry on business effectively in the United States.

Thus construed, the Act would check the trade and commerce which it was designed to protect.

(2) Had Congress constitutional power to prohibit, and did Congress by the Anti-Trust Act undertake to prohibit, the act of combining or vesting in a corporation or unincorporated association, by purchase, consolidation or otherwise, the ownership or control of competitive businesses for the purpose or with the effect of monopolizing the production and sale of an article of interstate commerce? In *United States* v. *E. C. Knight Co.*,[1] sometimes called the *Sugar Trust* case, the Supreme Court seems to have taken the view that Congress could not constitutionally prohibit and did not undertake to prohibit, the acquisition by a manufacturing corporation engaged in interstate commerce of the stock of other corporations engaged in the same business, although by such acquisition the purchasing company in fact acquired nearly complete control of the production of an article of interstate commerce and of the interstate commerce in this article. If this is the law, the Anti-Trust Act certainly has failed to prohibit the most effective method of monopolizing interstate commerce. However, as will be pointed out hereafter, the *Sugar Trust* case appears not to have involved the principle of constitutional law upon which the court based its decision, and the decision itself seems to have been overruled by subsequent decisions of the Supreme Court.

In the opinion of the writer, the actual decisions of the Supreme Court, with the exception of the decision in the *Sugar Trust* case, are consistent with a harmonious construction of the Act which would effect its purpose without preventing any business combinations or arrangements necessary to secure economy in production and in trade, and without interfering with any business methods that ever have been regarded as lawful and proper.

The cases arising under the Anti-Trust Act may be divided into four classes,[2] viz.:

1. CASES INVOLVING CONTRACTS, COMBINATIONS OR CONSPIRACIES TO RESTRAIN THE TRADE OR COMMERCE OF OTHER PERSONS, OR OF THE PUBLIC GENERALLY.

Contracts, combinations or conspiracies by means of physical

[1](1895) 156 U. S. 1.

[2]This classification was first suggested by the writer in an article entitled, "Should the Anti-Trust Act be Amended," published in 22 Harv. L. Rev. 492 (May, 1909).

force, or by means of threats of damage, or boycotting, to prevent other persons, or the public generally, from carrying on trade or commerce are illegal at common law, and it is eminently proper that contracts, combinations or conspiracies of that character, when in restraint of interstate or international trade or commerce, should be prohibited by an Act of Congress furnishing effective remedies for its enforcement.

The Supreme Court has decided that the first section of the Anti-Trust Act applies to contracts, combinations or conspiracies of that character. Thus, in the *Debs* case[3] the Supreme Court decided that a combination or conspiracy of certain railway employees to stop the operation of railways that were highways of interstate commerce was a restraint of interstate trade or commerce within the meaning of the Act. The stoppage or obstruction of the highways of interstate commerce necessarily operated as a direct restraint of the interstate commerce of the public generally.

In *Loewe* v. *Lawlor*,[4] sometimes called the *Danbury Hatters* case, the Supreme Court decided that a combination or conspiracy by means of a boycott to stop interstate trade or commerce between certain manufacturers and their customers was in restraint of interstate trade or commerce. In this case there was not, as there was in the *Debs* case, a physical obstruction of trade or commerce, but the purpose and the effect of the combination or conspiracy were to restrain other persons from engaging in interstate commerce by threatening damage to their business until certain demands of those entering into the combination or conspiracy were complied with.

Interstate trade or commerce also may be restrained by a contract or combination operating as a peaceable trade boycott, without the use of force or threats of damage. In *Montague* v. *Lowry*[5] the Supreme Court decided that the Anti-Trust Act rendered unlawful the formation of an association of the manufacturers of tiles throughout the United States and certain dealers in tiles in or near San Francisco, under an agreement that the manufacturers would not sell their products on any terms to persons who were not members of the associations and that the dealers who were members would not sell to non-members except at specified prices that were more than fifty *per cent.* higher than the prices

[3] *In re* Debs (1895) 158 U. S. 564.
[4] (1907) 208 U. S. 274.
[5] (1904) 193 U. S. 38.

payable by members. The plaintiffs in the case showed that in consequence of the restraint of their interstate commerce with the manufacturers, they had been compelled to buy tiles at higher prices from the local dealers. The combination, in this case, restrained interstate trade or commerce, because the combining manufacturers controlled the interstate trade or commerce in tiles and, through the agreement of association, monopolized this trade or commerce for the benefit of the members of the association. The case, therefore, may properly be included in the class of cases involving attempts to monopolize interstate trade or commerce in violation of the second section of the Anti-Trust Act. It should be observed that the decision in *Montague* v. *Lowry* is not an authority for the doctrine that individual manufacturers or producers of an article of interstate commerce cannot lawfully enter into agreements to sell their products to certain dealers and no others, there being no attempt to monopolize a branch of interstate commerce. Such exclusive trade agreements never have been deemed unlawful as in restraint of trade or as constituting monopolizing, and the court in its opinion pointed out that the case before it was not a case of that character.

2. CASES INVOLVING CONTRACTS OR COMBINATIONS OF PUBLIC CARRIERS TO INCREASE THE RATES OR TOLLS PAYABLE BY THE PUBLIC IN RESPECT OF INTERSTATE COMMERCE.

The railways are the principal highways of interstate trade and commerce. If, as it was decided in the *Debs* case, a combination or conspiracy by physical force to stop the operation of interstate railways would be in violation of the first section of the Act because in restraint of the interstate commerce of the public, it would seem to follow, for similar reasons, that a combination or conspiracy, without resort to physical obstruction, to render the transaction of interstate commerce upon the railways more difficult or more costly would be in restraint of interstate commerce within the meaning of the Act. In the *Trans-Missouri Freight Association* case,[6] and in the *Joint Traffic Association* case,[7] the Supreme Court held that contracts or combinations among railway companies to maintain rates as to competitive interstate traffic operated as a restraint of interstate trade or commerce. It was contended that

[6]United States *v.* Trans-Missouri Freight Association (1897) 166 U. S. 290.

[7]United States *v.* Joint Traffic Association (1898) 171 U. S. 505, 565, 569.

a combination to maintain rates as to competitive traffic could not fairly be considered in restraint of commerce unless the rates themselves were unreasonable; but the court held that, in such a case, it would not inquire into the reasonableness of the rates and that the combination must be deemed in restraint of commerce because its natural and direct effect was to maintain at a higher level than otherwise would prevail the rates payable by the public as a condition of carrying on interstate trade or commerce.

These traffic cases are not authority for the doctrine that a contract or combination among merchants or manufacturers would constitute a restraint of interstate commerce, prohibited by the first section of the Anti-Trust Act, on the sole ground that the effect of the contract or combination was to restrict competition among the parties. Railway companies furnish the transportation necessary to enable the public to engage in interstate trade or commerce, but they are not themselves engaged in interstate trade or commerce. In the traffic cases the stoppage of competition was in restraint of interstate commerce and unlawful, not because it restrained commerce of the railway companies which made the contracts or entered into the combinations, but because its effect was to restrain the interstate commerce of the public by imposing additional burdens upon this trade or commerce. As stated by the Supreme Court, the natural and direct effect of such contracts or combinations was to maintain rates at a higher level than otherwise would prevail.

In the *Northern Securities* case[8] the Supreme Court held that a combination to acquire and to vest in a holding company a majority of the stocks of two railway companies operating parallel and competing lines that were highways of interstate commerce was in restraint of interstate commerce within the meaning of the first section of the Anti-Trust Act. If, as decided in the traffic cases, a combination among railway companies by agreement to maintain rates was in restraint of interstate commerce within the meaning of the Act, because the natural and direct effect of the combination was to maintain rates at a higher level than otherwise would prevail, it seems to follow, as a necessary sequence, that a combination to bring about the same result by uniting the ownership of two parallel and competing interstate lines would likewise be unlawful, whether the combination be in the form of a corporation, an unincorporated joint-stock company, an ordinary partnership, or a trust.

[8]Northern Securities Co. *v.* United States (1904) 193 U. S. 197.

Prior to the decision of the traffic cases, there had been many contracts and combinations to maintain rates in respect of competitive traffic, or to divide or to pool competitive traffic; but such agreements never were regarded as practically enforceable, and there is little doubt that even prior to the passage of the Anti-Trust Act they were unlawful. Whatever view may be taken of the correctness of the decisions of the Supreme Court in the traffic cases, their importance has been greatly diminished by the enforcement of the laws prohibiting railway companies from granting secret rebates or from departing from their published rate schedules.

It has been contended that uniformity of rates upon competing lines as to traffic between the same points is a business necessity and that under the decisions in the traffic cases the railway companies cannot lawfully consult among themselves for the purpose of establishing this necessary uniformity of rates. In the opinion of the writer, the Supreme Court has not decided and is not likely to decide that the Anti-Trust Act prohibits consultations among railway officials for the purpose of adjusting their rate schedules and establishing uniform rates as to competitive business, provided that the companies retain their freedom to modify these rates and do not agree to maintain them. In the traffic cases the restraint of interstate commerce did not arise from the fact that the railway companies had consulted each other for the purpose of *establishing* uniform rates, but it arose from the fact that they had entered into agreements or combinations *to maintain* rates by preventing the several companies from changing the rates as so established.

3. CASES INVOLVING CONTRACTS OR COMBINATIONS THAT, WITHOUT RESTRAINING THE TRADE OR COMMERCE OF OTHERS AND WITHOUT MONOPOLIZING, OR ATTEMPTING TO MONOPOLIZE TRADE OR COMMERCE, SIMPLY DIMINISH COMPETITION AMONG THOSE CONTRACTING OR COMBINING.

The Supreme Court never has decided that contracts or combinations of this character are prohibited by the Anti-Trust Act. Although *dicta* may be found in the opinions of the court which, taken without regard to the context, might seem to indicate that the court considered that *all* contracts and combinations restricting competition in any degree were prohibited by the Anti-Trust Act, no such conclusion can fairly be deduced from these opinions when considered in their entirety. In some of the cases the court held

that the contracts or combinations in question were unlawful on the ground that they were "in restraint of trade or commerce," and the court did not specifically assign as the ground of its decision that the effect or purpose of the contracts or combinations was to monopolize a branch of interstate trade or commerce in violation of the second section of the Act; but it is apparent that the court did not proceed on the ground that *every* restriction of competition would constitute a prohibited restraint of commerce, without regard to the degree to which competition was eliminated. If the court had been of opinion that every restriction of competition was in violation of the Act, it is not likely that the court would have labored, as it did, to show that the restriction of competition was carried to such an extent as to monopolize trade or commerce. Thus, in the case of the *Addyston Pipe Company*,[9] it appeared that nearly all the manufacturers of iron pipe within thirty-six States and territories had combined under an agreement to apportion among the members of the combination the trade in iron pipe within the prescribed part of the United States. The purpose of the combination was, by establishing a community of interest among the manufacturers to destroy competition among them and to monopolize for their benefit the trade in iron pipe. Although in its opinion the court referred to this transaction as "in restraint of commerce," the transaction undoubtedly constituted monopolizing within the meaning of the second section of the Anti-Trust Act, and if the restriction of competition had not been carried so far as to constitute monopolizing in violation of the second section, probably it would not have been adjudged to be illegal. A combination, by a partnership or otherwise, to establish a community of interest among manufacturers controlling only a minor share of the trade in iron pipe probably would not have been condemned.

As pointed out above, the cases involving rate agreements among railway companies are not authority for the doctrine that contracts or combinations among merchants or manufacturers which, without monopolizing commerce, simply restrict competition among those contracting or combining are in violation of the Anti-Trust Act. The decisions in the railroad cases were based on the ground that the natural and direct effect of the contracts or combinations was to restrain the trade or commerce of the public by increasing the tolls upon the highways of interstate commerce.

[9] Addyston Pipe & Steel Co. *v.* United States (1899) 175 U. S. 211.

At common law contracts and combinations of the class now under consideration were not unlawful, with this exception: A contract of an individual not to exercise his craft or trade was held to be unreasonable, contrary to public policy and void, unless the contract was incidental to carrying out some fair and lawful transaction, such as the sale of a business or good-will.[10] This exception was for the purpose of protecting the personal liberty of individuals and in considering the effect of the Anti-Trust Act it is not material. That Act was not passed to protect individuals against the consequences of their own acts, but, as indicated by its title, was designed to enforce the broad policy of protecting the trade and commerce of the community against unlawful restraints and monopolies. Probably Congress would have no constitutional power to pass a law merely for the regulation of private rights, by prohibiting individuals under criminal penalties from entering into mutual contracts or combinations restricting their own power to engage in interstate trade or commerce.

Many contracts and combinations that restrict competition simply among those contracting or combining are necessary to the successful conduct of trade and commerce and such contracts and combinations always have been considered reasonable and proper throughout the civilized world. If such contracts were prohibited by the Anti-Trust Act, it would be impossible, without incurring civil and criminal liabilities, to carry on trade and commerce in the United States. Certainly Congress never intended to destroy trade and commerce by an Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

If Congress had intended to prohibit all contracts and combinations that in any degree diminish or restrict competition in trade or commerce, it is likely that Congress would have expressed this in the Act. But the Act does not purport to prohibit contracts or combinations that restrain *competition* in trade or commerce. The word "competition" does not appear in the Act. To construe the first section, which prohibits contracts and combinations "in restraint of trade or commerce," as prohibiting all contracts and combinations that diminish competition in a branch of trade or commerce would give to the phrase "in restraint of trade or commerce" a meaning never before attributed to it by lawyers or by the public generally.

[10] *Cf. per* Mr. Justice Holmes in Northern Securities Co. *v.* U. S. *supra*, 404; Cincinnatti etc. Packet Co. *v.* Bay (1906) 200 U. S. 179.

The fact that, by the second section, Congress in effect prohibited contracts, combinations and conspiracies to destroy competition to such an extent as to monopolize trade or commerce indicates that Congress did not intend to prohibit minor restrictions of competition which did not amount to monopolizing. Certainly in view of the express prohibition of monopolizing, the prohibition of "restraints of commerce" in the first section should not be extended *by implication* so as to prohibit restrictions of competition which, at common law, were not deemed in restraint of commerce.

Therefore, the first section should be construed as prohibiting only contracts, combinations and conspiracies to restrain the liberty or power of others, or of the public generally, to carry on interstate and international commerce freely and without hindrance. The second section should be construed as dealing with the subject of competition and as prohibiting action destructive of competition to such an extent as to constitute monopolizing as hereafter defined, and contracts, combinations or conspiracies to effect that result.

4. CASES INVOLVING ATTEMPTS TO MONOPOLIZE, OR COMBINATIONS OR CONSPIRACIES TO MONOPOLIZE ANY PART OF INTERSTATE OR INTERNATIONAL TRADE OR COMMERCE.

In construing and enforcing the Anti-Trust Act the principal difficulty is to determine the precise meaning of the words "to monopolize" as used in the second section of the Act. The question is not whether industrial monopolies are harmful or beneficial to the community, or whether the Anti-Trust Act embodies a sound economic or governmental policy. Judges cannot properly allow themselves to be influenced by their own views upon questions of political economy or of state policy. It is their duty to give effect to the will of the legislature as declared in the statutes.

The word "monopolize" has no settled legal or technical meaning. In the year 1623 a statute was passed by Parliament declaring that all grants of monopolies were against the fundamental laws of the Kingdom. In commenting on this statute in his Institutes, Lord Coke said:

"A monopoly is an institution or allowance by the King, by his grant, commission or otherwise, to any person, or persons, body politic or corporate, of or for the sole buying, selling, making, working or using of anything whereby any person or persons, body politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade."

It is evident that in giving this definition Lord Coke referred only to a particular class of monopolies, namely, those created by royal grant. However, although in those early days the word "monopoly" may have been used in England to designate only an exclusive right or privilege conferred by law, or by royal grant, and although, in those days, the word "monopolize" may not have been used by law-makers or by the courts, many acts destructive of competition which at the present day would be described as "monopolizing" were unlawful at common law, or were prohibited by statute.[11] In modern times the words "monopoly" and monopolize" often have been used in their ordinary or popular sense in judicial decisions and in statutes, as well as in general literature.[12]

According to common usage in modern times, the phrase "to monopolize commerce" means, by the elimination of competition to secure to some individual or group of individuals control of all or of a largely preponderating part of the commerce in some article. The phrase would not apply to a simple lessening of competition leaving in existence reasonably competitive conditions; but it would apply to the act of concentrating control of the commerce in any article to such a degree as to destroy reasonably competitive conditions, though competition be not wholly destroyed.

As a rule commerce can be monopolized only as to some particular article or articles, and only at certain places or markets. It never can be monopolized as to all articles at all places. The Anti-Trust Act prohibits monopolizing "any part" of interstate or international commerce. By these words Congress intended to prohibit the monopolization of interstate or international commerce in any article as to any part of the United States. Thus, as decided in *Montague* v. *Lowry* above referred to, a combination monopolizing trade or commerce in unset tiles between a part of California and other States was in violation of the Act. However, a combination among all the merchants or all the manufacturers dealing in, or producing, an article of commerce in a particular State or locality would not necessarily be in restraint of interstate or international commerce or constitute monopolizing interstate or international commerce. It would not be in restraint of interstate or international commerce or constitute monopolizing, unless its effect should be to restrain other persons from obtaining a like article through interstate or international commerce, or should be to con-

[11] 4 Bl. Com. 158, 159.

[12] See National Cotton Oil Co. *v.* Texas (1905) 197 U. S. 115.

centrate control of such commerce to such a degree as to destroy reasonably competitive conditions.

Although the term "to monopolize" has been in common use for many years, and has been used for more than a century by English as well as American judges,[13] it must be conceded that the meaning of the term is not so definite as to render it practicable in every case to determine easily and with certainty whether the term applies. In each case the question would be whether there was such destruction of competition and such acquisition of control of commerce as to constitute "monopolizing" commerce. In many cases the answer to the question would not be doubtful, but in other cases there might be grounds for a difference of opinion. Thus, it seems plain that the term "to monopolize" would not apply to an acquisition of control of less than one-half of the commerce in an article leaving the greater part of the commerce in the hands of competitors; but if control of substantially more than one-half of the commerce in the article was acquired, there might be a difference of opinion whether the elimination of competition had been carried to such a degree as to render the term applicable.

It has been suggested that the test should be whether the restriction of competition and the concentration of control of commerce were carried so far as to become injurious to the public by conferring upon a person or group of individuals the power to control the price of some article of commerce. It should be observed, however, that this test was not prescribed by Congress, and the courts have no right to adopt some test or rule not prescribed by law, merely because this may be clearer and more definite than the language of the statute. It is their duty to enforce the statute as enacted. Moreover, it is doubtful whether the test above suggested would furnish a more definite rule than the statute itself. No doubt, power in a greater or less degree to control prices often is a consequence and the object of monopolizing commerce in an article, but in many cases such a power may be obtained without such acquisition of control of commerce as would constitute monopolizing within the accepted meaning of that word. In many cases the possession of even a small proportion of the supply of an article of commerce would confer power temporarily to control its price, but this would not constitute monopolizing. The term "to monopolize" would not be applicable unless control of commerce was concen-

[13] For example see *per* Lord Kenyon in The King *v.* Waddington (1800) 1 East 143, 156; 4 Bl. Com. 159, 160.

trated to such an extent as to put an end to reasonably competitive conditions.

It has been urged that the meaning of the term "to monopolize" is so vague and so uncertain that the statute in its present form cannot be enforced. There may be good ground for reaching this conclusion with respect to the enforcement of the criminal provisions of the Act. However, the fact that in some cases it may not be clear whether a particular transaction constitutes monopolizing commerce within the meaning of the Act seems not to be a sufficient reason for refusing to enforce the Act in other cases which clearly are within its terms.[14]

Few statutes and few rules of the common law are expressed in language so definite as to render their application in border-line cases free from uncertainty and doubt. There is scarcely a criminal or civil statute or rule of the common law that has not been a source of uncertainty and litigation. The principal function of the courts of appeal always has been to construe and to apply such statutes and rules in individual cases as they arise and, by authoritative decisions, to give a more definite legal meaning to the language of the law. Even the Constitution contains many provisions that have been the source of endless uncertainty and doubt, as, for example, the provision under which the Anti-Trust Act was passed, giving to Congress power to regulate interstate and international commerce. After more than a century of judicial decisions, the precise meaning of many constitutional and statutory enactments remains uncertain and their precise scope and effect probably never will be settled.

Under a complex civilization the lawfulness of acts often must be made to depend upon complex conditions and cannot be determined by simple rules that can be applied without the exercise of discretion and in a mechanical manner. As has been pointed out by the Supreme Court, even in giving effect to constitutional provisions, questions of degree often are the controlling ones.[15] Similarly, in determining the lawfulness of acts of individuals it often is necessary to pass upon questions of degree, or to determine what, under all the circumstances of a given case, is reasonable. Thus, the courts may be called upon to pass upon the reasonableness of railroad rates, having regard to a multitude of conditions, including the relative adjustment of rates between different localities. Such

[14] *Cf.* Waters-Pierce Oil Co. v. Texas (1909) 212 U. S. 86.

[15] Wisconsin etc. Railroad Co. *v.* Jacobson (1900) 179 U. S. 287, 301.

an inquiry commonly would present practical difficulties at least as great as those presented by an inquiry whether a given transaction destroyed competition in interstate trade or commerce to such an extent as to put an end to reasonably competitive conditions and to constitute what is called "monopolizing."

During the last presidential campaign Mr. Bryan proposed in effect to define as an unlawful monopoly any combination controlling more than fifty *per cent.* of a branch of trade or commerce. Such an arbitrary rule, however, probably would not lead to greater certainty, inasmuch as the percentage of control would fluctuate, and it would be exceedingly difficult, if at all practicable, to determine the percentage of an entire industry or branch of trade at any one time concentrated under common control. Moreover, such a rule would not prove just or wise in all cases. No doubt it would be desirable to define the term "to monopolize" so clearly and definitely as to render it easy to determine its application in any case that may arise; but it is very doubtful whether such a definition can be framed. A statutory definition probably would give rise to as much uncertainty and litigation as the term "to monopolize," and judicial decisions would be necessary to define the definition itself. The safer and better course seems to be to let the courts, in light of common understanding of the word "monopolize," settle the precise meaning of the statute by determining its application to individual cases as they arise. The question in each case would be whether there was such destruction of competition as to put an end to reasonably competitive conditions.

The Anti-Trust Act prohibits not only the monopolizing of any part of interstate or international trade or commerce but also every attempt to monopolize and every combination or conspiracy to monopolize. An attempt to monopolize, or a combination or conspiracy to monopolize, would be unlawful although it may not have proved successful in actually accomplishing its purpose. However, it is obvious that there can be no attempt to monopolize and no combination or conspiracy to monopolize, unless there be an intent or purpose to effect a monopoly, or unless the necessary result of the acts of the parties would be to create a monopoly, in which event the intent or purpose to monopolize would be implied.[16]

[16] See *per* Mr. Justice Holmes in Swift & Co. *v.* United States (1905) 196 U. S. 375, 396, 402.

Commerce in an article may be monopolized by one person, or by a group of persons; and it may be monopolized by a group of persons through concerted action, without placing their property or their business under a common control. Thus if a group of persons or corporations carrying on business separately, but in the aggregate controlling the interstate commerce in an article, should enter into a contract or combination to destroy reasonably competitive conditions in this commerce by dividing the business among the competitors according to territory or otherwise, or by dividing profits, or by fixing prices, or by any other device, this would constitute monopolizing within the meaning of the Anti-Trust Act.[17]

It should be observed that the second section of the Act does not in terms prohibit "monopolies" or declare monopolies to be unlawful. It only declares it to be unlawful to monopolize, or to attempt, combine or conspire to monopolize. The verb "to monopolize" implies action taken to eliminate competition so as to create a monopoly. If a person or corporation should acquire a monopoly in a branch of trade or commerce without taking any action to destroy or to prevent competition, this would not constitute monopolizing or attempting to monopolize. Thus, if a person or corporation should develop an entirely new industry or branch of trade, this would not be monopolizing, though there be no competitors. So also, if a person or corporation should obtain a monopoly of an existing branch of trade or commerce by economy of production or successful trading, and not by combining with competitors, or buying them up, or by practices indicating a purpose through the destruction of competitors to create a monopoly, this would not be monopolizing within the meaning of the Act.

Whether a combination is destructive of reasonably competitive conditions in interstate or international commerce is a question of fact that can be determined only in view of all facts and conditions relating to the branch of interstate or international commerce affected by the combination. Thus a combination of all the manufacturers in the United States producing an article of interstate commerce would not necessarily destroy reasonably competitive conditions in the interstate commerce in this article if, at the time of the formation of the combination, the same article produced by foreign manufacturers entered into interstate commerce so largely

[17]Addyston Pipe & Steel Co. *v.* United States (1899) 175 U. S. 211; Swift *v.* United States *supra;* Continental Wall Paper Co. *v.* Voight (1909) 212 U. S. 227.

as to preserve reasonably competitive conditions. But if, at the time of its formation, a combination was destructive of reasonably competitive conditions in a branch of interstate or international commerce, the fact that the combination did not increase prices, or that substantial competition grew up after prices had been increased, would not be a defense to a charge that the formation of the combination was in violation of the Anti-Trust Act.

The Supreme Court never has decided that a combination diminishing competition in interstate or international commerce can be condemned as in violation of the Anti-Trust Act solely by reason of the magnitude of its capital or by reason of the large volume of its business. The size of the capital of a combination or the volume of its business would not determine whether the formation of the combination was destructive of reasonably competitive conditions in any branch of interstate or international commerce. Size is relative; and the size of a combination has no necessary relation to competition in interstate or international commerce. A combination involving fifty million dollars may destroy reasonably competitive conditions in some branch of interstate or international commerce, while a combination involving five hundred million dollars may not be destructive of reasonably competitive conditions in any branch of commerce. The business of a combination may include *intra*state commerce; and, though the aggregate of the interstate or international commerce of the combination may be very large, it may not include a monopoly of any branch of interstate or international commerce, or of the commerce in any article. In considering whether a combination is in violation of the Anti-Trust Act the volume of its interstate or international commerce in some particular article may be material, but only by reason of its relation to the entire volume of interstate or international commerce in the same article and only for the purpose of ascertaining whether the combination destroyed reasonably competitive conditions in this commerce.

The formation of an association or exchange for the purpose of preserving business integrity among its members and of securing orderly and efficient methods of transacting business clearly would not restrain commerce or monopolize commerce. Accordingly, in *Anderson* v. *United States*[18] the Supreme Court decided that the formation of an association or exchange by those dealing in live

[18] (1898) 171 U. S. 604. See also Hopkins *v.* United States (1898) 171 U. S. 578.

stock at the Kansas City stockyards was not in violation of the Anti-Trust Act though the rules of the association fixed the commissions to be charged upon sales of live stock, and prohibited members of the association from dealing in live stock with persons who were not also members. The court held that, as competition among the members of the association was not restricted and as anyone, by complying with the rules of the association, could become a member, there was no agreement or combination in restraint of interstate commerce or to monopolize interstate commerce in violation of the Anti-Trust Act.

It is clear that it was not the purpose of Congress by the Anti-Trust Act to restrict the exclusive right or monopoly granted under the patent laws to the owner of letters patent issued by the Government. Accordingly in *Bement* v. *National Harrow Co.*[19] the Supreme Court decided that the owner of a patent could reserve to himself the exclusive use of the patented invention or could permit others to use it upon such terms as he might see fit, and that the Anti-Trust Act did not prohibit the granting of a license to use a patented invention upon conditions fixing the prices at which articles manufactured under the patent should be sold and providing for the preservation of the monopoly of the right use of the invention during the term of the patent.

It has been argued that as the statute makes it illegal to monopolize any part of interstate or international commerce every act *tending to create a monopoly* likewise is made unlawful; and, therefore, that every contract or combination in any degree diminishing competition in interstate or international commerce is unlawful, though taken alone, such diminution of competition, would not create a monopoly or constitute monopolizing. This argument indicates loose reasoning or a confusion of ideas. The meaning of the words "tending to create a monopoly" is not clear; but if these words mean something different from the words of the statute, the courts cannot read them into the statute. Although a restriction of competition between competitors in a branch of trade may not of itself constitute monopolizing, it may be part of an attempt, combination or conspiracy to monopolize, and therefore in violation of the statute. But if a restriction of competition of itself does not constitute monopolizing and is not part of an attempt, combination or conspiracy to monopolize, it cannot by any correct use of language be called "tending to create a monopoly" and it cannot be

[19] (1902) 186 U. S. 70.

declared unlawful on the ground that a subsequent additional restriction of competition by the same parties or by others may constitute monopolizing in violation of law. An act which is not prohibited by law cannot be declared by the courts to be unlawful because subsequent independent acts of a similar character may be unlawful.

It seems clear that, in the Anti-Trust Act, Congress intended to use the word "monopolize," not in some disused or technical sense, but in the sense in which it was commonly understood at the time of enactment of the statute. Accordingly, in a number of cases the Supreme Court has decided that the Anti-Trust Act renders unlawful contracts or other combinations, by the destruction of competition, to secure for the benefit of certain individuals or groups of individuals control of interstate trade or commerce in any article which is the subject matter of trade or commerce.[20]

However, in the *Sugar Trust* case,[21] the Supreme Court seems to have held that, notwithstanding the Anti-Trust Act, a manufacturing company producing an article of interstate commerce may lawfully purchase the manufacturing plants and businesses of all its competitors in the same business, although the effect of the purchase may be to monopolize the manufacture and sale of an article of interstate commerce and consequently to monopolize interstate commerce in this article. It appeared that the American Sugar Refining Company had purchased the control of four independent sugar refining companies, paying therefor by transfer of shares of its own stock; that refined sugar was an article of interstate commerce; that all the companies were engaged in interstate commerce in refined sugar; and that by such purchases the American Sugar Refining Company acquired nearly complete control of the business of manufacturing and selling refined sugar throughout the United States. The Supreme Court held that this transaction was not in violation of the Anti-Trust Act.

The precise grounds upon which the Supreme Court based its decision in the *Sugar Trust* case are not stated clearly in the opinion delivered by the court. Apparently, however, the court based its conclusion upon the following propositions: (1) that commerce succeeds to manufacture and is not a part of it, and, therefore, although a combination or conspiracy to control the business of manufacturing an article of interstate commerce may tend to re-

[20]Addyston Pipe Co. *v.* United States *supra;* Swift *v.* United States *supra;* Continental Wall Paper Co. *v.* Voight *supra.*

[21]United States *v.* E. C. Knight Co. *supra.*

strain interstate commerce, the restraint in such case would be only an indirect result, however inevitable, and whatever may be its extent; (2) that, under the power to regulate commerce, Congress can only prescribe the rules by which commerce shall be governed and cannot regulate the use or the disposition of property, or prohibit monopolizing a manufacturing business, merely because ultimately interstate or international commerce may be affected; (3) that in view of these constitutional limitations Congress did not attempt by the Anti-Trust Act to deal directly with monopoly as such, or to limit and restrict the rights of corporations or of citizens of the States in the acquisition, control or disposition of property, or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted; (4) that the contracts and the acts of the defendants related exclusively to the acquisition of certain refineries and the business of refining sugar in Pennsylvania and bore no direct relation to commerce between the States or with foreign nations; and (5) that, although the instrumentality of interstate commerce was necessarily invoked to dispose of the products of the refineries, it did not follow that an attempt, even though effectual, to monopolize the manufacture of refined sugar was an attempt to monopolize the trade or commerce in refined sugar, the proofs failing to indicate any intention to restrain interstate trade or commerce.

The decision in the *Sugar Trust* case was one of the earliest decisions under the Anti-Trust Act and, in the opinion of the writer, cannot be reconciled with the subsequent decisions of the Supreme Court. In a number of subsequent cases the court decided that Congress had constitutional power to prohibit, and by the Anti-Trust Act did prohibit, monopolizing, or attempting to monopolize, or combining or conspiring to monopolize interstate trade or commerce by means of contracts or trade arrangements among competitors; yet it is clear that Congress has no greater power to prohibit the making *of contracts* that are sanctioned by state laws than to prohibit the acquisition or use *of property* sanctioned by state laws. In the *Northern Securities* case the court decided that Congress had power to prohibit, and by the Anti-Trust Act did prohibit, a combination restraining interstate commerce by acquiring and vesting in a holding company a controlling amount of the shares of capital stock of two railway companies owning parallel and competing interstate lines. In the

Sugar Trust case the transaction challenged by the Government consisted of the acquisition by a manufacturing corporation, through an exchange of shares, of a controlling amount of the capital stock of practically all its competitors in interstate commerce.

The prohibitions of the Anti-Trust Act are expressed in comprehensive terms and are subject to no limitations. The second section of the Act would have been no broader if, in specific terms, it had prohibited persons from monopolizing, or attempting to monopolize and from combining or conspiring to monopolize interstate commerce "by purchasing the plants and businesses of competitors in interstate commerce, or by contracting or combining with competitors, or by any other acts whatsoever." If the prohibition had been expressed in those specific terms, could the courts condemn the statute as unconstitutional so far as it prohibited monopolizing by purchasing the plants and businesses of competitors in interstate commerce, while sustaining the constitutionality of the Act so far as it prohibited monopolizing by contracting or combining with competitors?

The first question in the *Sugar Trust* case was whether the purchase by the American Sugar Refining Company of practically all its competitors in the business of refining sugar and of carrying on interstate commerce in refined sugar did in fact destroy reasonably competitive conditions in interstate commerce in refined sugar and constituted monopolizing interstate commerce within the meaning of the Anti-Trust Act. The only constitutional question was whether Congress could prohibit the acquisition of competitive businesses under those specific circumstances and conditions. The Supreme Court appears to have assumed that the constitutional question presented was whether Congress had power to regulate a manufacturing business, or the acquisition or the use of property for manufacturing purposes merely because, ultimately, the products of the business might become the subject matter of interstate commerce, or because the property might be used in such a manner as to affect interstate commerce. Undoubtedly the court was right in holding that Congress had not that power; but no such question was involved in the case. There is a wide difference between the proposition (1) that Congress can pass a law prohibiting the owner of a business from acquiring, by purchase, or by consolidation, or otherwise, the ownership or control of competitive businesses when the purpose or the effect of the acquisition is to monopolize interstate

commerce, and the proposition (2) that Congress can pass laws regulating the conduct of a manufacturing business as to matters having no relation to interstate commerce, or laws regulating the acquisition or use of property for manufacturing purposes under conditions having no relation to interstate commerce, merely because the products of the business may enter into interstate commerce. In the *Sugar Trust* case the question was *not* whether Congress had constitutional power to prohibit a manufacturing corporation engaged in interstate commerce from purchasing a competitive business under *all* circumstances or conditions. The only constitutional question was whether Congress could prohibit the purchase of control of competitive businesses under the specific conditions prescribed in the Act, namely, when the purpose or the effect of the transaction was to monopolize interstate commerce: in other words, the question was whether Congress could prohibit individuals and corporations from monopolizing interstate commerce by means of purchases of competitive businesses.

If the power to regulate commerce included power to prohibit parties from restraining or monopolizing interstate commerce, it seems clear that Congress could prohibit them from restraining or monopolizing commerce by any scheme or contrivance. Few acts are unlawful without regard to their effect or purpose; and persons often enter into combinations and conspiracies to accomplish unlawful purposes by indirect methods, or by acts which, considered without regard to their effect or purpose, would not be unlawful. Congress would not be helpless to prevent parties from restraining or monopolizing interstate commerce by indirect methods; but it is difficult to perceive how there could be a more direct, or more effective, or more permanent way of monopolizing interstate commerce than by buying up or consolidating with all competitors in the business of producing some article of interstate commerce and of carrying on interstate commerce in this article.

The fact that a regulation of interstate commerce prohibiting parties from monopolizing interstate commerce by combining the ownership or control of competitive businesses would affect the liberty of the parties to buy or to sell property under these specific conditions would not be a ground for denying the power of Congress to pass such a regulation. A regulation of interstate commerce cannot be declared unconstitutional on the ground that its effect would be to deprive individuals of the liberty to make contracts or to deal with their property in violation of the

regulation. The fact that the Constitution does not confer upon Congress the power to regulate the acquisition, ownership or use of property is no reason for holding that Congress cannot regulate interstate commerce in property, or that Congress cannot prohibit persons engaged in interstate commerce from combining their plants and businesses when such combination would destroy reasonably competitive conditions in interstate commerce.

The question remains what remedies should be applied by the courts if parties have monopolized or have attempted to monopolize a branch of interstate or international trade or commerce. If the monopolization has not been consummated, the proper remedy seems to be an injunction restraining the parties from carrying into effect their unlawful scheme. If, however, the monopolization has been consummated by vesting competitive businesses in a corporation, an unincorporated association or a trust, the proper remedy would seem to be an injunction restraining the corporation or unincorporated association, or the trustees of the trust, from continuing to monopolize trade or commerce in violation of the law, and by requiring them under penalties to undo their wrongful acts by selling, or by distributing among their individual shareholders, members, or beneficiaries so much of their property and business obtained from former competitors, or shares of stock in companies previously competing, as may be necessary to restore reasonably competitive conditions in the monopolized branch of trade or commerce.

Such construction and such enforcement of the Anti-Trust Act, in the opinion of the writer, would carry out its true intent and purpose and would be for the best interests of the whole country. A decision following the supposed authority of the *Sugar Trust* case and holding that the Anti-Trust Act does not prevent the effective monopolization of interstate trade or commerce by combining or vesting in a corporation the plants and businesses of practically all manufacturers and sellers of an article of interstate commerce surely would not be accepted by the people of the United States as a final solution of the trust problem. Such a decision probably would result in an imperative popular demand for legislation of a socialistic character and possibly it might lead to an amendment of the Constitution. Governmental regulation of corporations and trusts as to their organization and their methods of conducting business, while leaving them the fruits of monopoly, would not be accepted as sufficient. The demand would be that

those who have monopolized a branch of trade or commerce shall be deprived of the fruits of monopoly, either by governmental regulation of the prices of commodities, or by exercise of the taxing power of the government. The evils and dangers that would result from such legislation cannot be overestimated. Therefore, those who are interested in our great industrial combinations or trusts should consider carefully the question whether such a decision would place them ultimately in a better or in a worse position than a decision requiring, as above suggested, the restoration of reasonably competitive conditions.[22]

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[22]The foregoing article is an expansion of an article published by the writer in *The New York Times* for October 9, 1909.